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No. 192

In the Supreme Court of the United States

October Term, 1940

KATE B. CONNER and E. FIELD CONNER, JR., PLAINTIFFS
vs.
THE ESTATE OF EDWARD F. CONNER, DECEASED, DEFENDANT

UNITED STATES OF AMERICA

ON CERTIORARI TO THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

BRUCE FOR THE UNITED STATES OF AMERICA

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

(1)

QUESTION PRESENTED—

The Secretary of War seized vessels leased to the respondent; the court below found the seizure tortious and unauthorized. The question presented is whether the court, in valuing petitioner's lease, should, in the circumstances of this case, have considered market value, and particularly whether it should have considered evidence as to an offer to rent the vessels, made two years after the seizure.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, p. 9.

STATEMENT

On May 28, 1919, a contract was entered into between petitioner¹ and respondent, represented by the Chief of Engineers, United States Army, providing for the lease to petitioner, with an option to purchase, of certain barges and towboats which respondent was constructing for use as carriers on the Mississippi River and its tributaries.² Section 8 of the contract provided that the Chief of Engineers, as lessor, could terminate the contract at any

¹ Upon the death of Edward F. Goltra on April 2, 1939, his executors, Kate B. Goltra and E. Field Goltra, Jr., were substituted as parties plaintiff (Fdg. 1). "Petitioner," when used herein, refers to the executors as well as to Edward F. Goltra.

² A supplemental contract between the same parties providing for certain unloading facilities was entered into and made a part of the original contract on May 26, 1921 (Fdg. 6).

time that in his judgment petitioner was guilty of a breach of the contract. After various negotiations concerning the rates to be charged by petitioner (Fdgs. 8-14), nineteen barges and four towboats were delivered to petitioner on July 15, 1922 (Fdg. 15). These vessels, owing to mechanical difficulties and low water, were operated by petitioner on a very limited scale (Fdgs. 16, 17, 35).

About December 1, 1922, petitioner, with the consent of the District Engineer, and in accordance with local custom, placed the barges and towboats in winter quarters at St. Louis, Missouri (Fdg. 18). During this lay-up period petitioner was informed that various commercial organizations interested in transportation on the Mississippi River had complained to the Secretary of War of the inactivity of this fleet, and was notified by the Secretary that a failure to operate at maximum capacity would be regarded as a violation of the contract (Fdg. 20). Subsequently, while the boats were still tied up, the Secretary of War, on March 3, 1923, notified petitioner that because he had failed to comply with the terms of the contract, the contract was terminated (Fdg. 23). Petitioner, on being informed of the Secretary's action, refused to comply with his request to deliver the boats to the designated official (Fdg. 25). On March 25, 1923, pursuant to orders of the Acting Secretary of War (Fdg. 29), the boats were seized from petitioner and possession taken by the United

States (Fdg. 28). On April 27, 1923, petitioner was notified by the Chief of Engineers that in his judgment petitioner had failed to comply with the terms of the contract and therefore he was terminating the contract; the letter was signed at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers (Fdg. 38).

Petitioner brought suit against the Secretary of War, seeking to enjoin him from seizing the vessels. The suit was concluded by a judgment of this Court adverse to petitioner (Fdg. 40), based on the ground that the Chief of Engineers as lessor, representing the United States, had exercised his judgment, without fraud, in terminating the contract. *Goltra v. Weeks*, 271 U. S. 536.³

This action was instituted in the Court of Claims on July 21, 1934, pursuant to Private Act No. 69, 73d Cong., 2d Sess., *infra*, p. 9, conferring jurisdiction upon that court to hear, determine, and enter judgment upon the "claims of Edward F. Goltra against the United States for just compensation" for the taking of the vessels and unloading apparatus, whether taken "tortiously or not,"

³ As petitioner obtained a temporary injunction in the district court (Fdg. 39), he regained possession of the vessels in September 1924 (Fdg. 39). However, by reason of the Supreme Court decision in *Goltra v. Weeks*, *supra*, respondent again took possession of the vessels during July 1926 (Fdg. 40).

without regard to the statute of limitations, or to any previous court decisions.

The court below found that the Chief of Engineers had not exercised his own judgment in cancelling the contract, but had been coerced into cancelling the contract subsequent to the actual seizure of the vessels. It accordingly held that the contract had not been terminated in accordance with its provisions, and that the seizure of the vessels was tortious and unauthorized. The court allowed \$350,000.00 as compensation for the vessels, unloading apparatus, and all other claims. To this amount it added interest, as "part of just compensation," at six percent from the date of the seizure.

In computing the amount of the compensation the Court of Claims did not make certain findings of fact requested by petitioner with regard to the market rental value of the vessels. The court held that evidence of an offer to rent the vessels, made two years after the seizure, could not be considered, and that the rental value of similar vessels on the Mississippi River could not be taken into account because there were none at that time. Hence it concluded that "There was no market value for the lease and option to purchase."

ARGUMENT

Petitioner brought this suit against the United States under a special jurisdictional Act to recover compensation for the alleged illegal seizure by

agents of the United States of certain vessels which the United States had leased to petitioner. The court below held that the seizure was illegal, and awarded to petitioner \$350,000.00, with interest, as compensation.

The Government thinks the special jurisdictional Act confers the right of appeal to this Court, and has taken an appeal as to the allowance of interest against the United States. Out of an abundance of caution the United States has also filed a petition for certiorari on that issue (No. 191 this Term). Petitioner has filed a cross appeal as to the amount of the judgment, and the petition for certiorari to which this brief in opposition is directed. Petitioner, conceding that standing alone the petition presents no grounds for certiorari, presses it only if the Court holds that the appeal and cross appeal do not lie and grants the Government's petition (Pet. 10).

1. Petitioner complains (Pet. 11-13) of the refusal of the court below to take into consideration market rental value, which petitioner sought to establish principally by evidence of an offer by officials of the Standard Oil Company, made two years after seizure of the vessels, to lease them for a period of five years. The holding below follows the rule that property of a sort not actively traded in has no market value, so that offers to buy it are not necessarily admissible for determining the value of such property. *Sharp v. United*

States; 191 U. S. 341, 348-349; *Sommers v. Commissioner of Internal Revenue*, 63 F. (2d) 551, 552-553 (C. C. A. 10th); *Clarke v. Hot Springs Electric Light & Power Co.*, 55 F. (2d) 612, 616 (C. C. A. 10th). Compare *Standard Oil Co. v. So. Pacific Co.*, 268 U. S. 146, 155; Orgel, *Valuation under Eminent Domain*. (1936), pp. 119-120. Here the court found that there were no other vessels on the Mississippi River like those seized, and petitioner does not specifically challenge the finding. Under its application of the rule excluding evidence of offers to buy was clearly proper. The cases cited by petitioner (Pet. 12-14) do not reject the rule; in each of them property like that being valued was being actively bought and sold. Moreover the question of admissibility turns in each case upon the particular showing there made, and plainly does not warrant review by this Court.

2. Petitioner also argues (Pet. 12-13) that if this Court accepts the Government's contention that the seizure of the vessels was tortious and not an eminent domain taking, petitioner then will be entitled to have the Standard Oil offer considered in fixing the value of the vessels, just as much as if the taking were by eminent domain. We do not, of course, dispute this proposition. The rules for valuing the property are the same whether the taking was tortious or by eminent domain. *United States v. New River Collieries Co.*, 262 U. S. 341, 344.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

✓ FRANCIS BIDDLE,
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JULY 1940.

APPENDIX

Private Law, No. 69, of April 18, 1934, 73d Congress, 2d Sess. (c. 150, 48 Stat. 1322):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided*, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further*, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

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SUPREME COURT OF THE UNITED STATES.

Nos. 191, 192.—OCTOBER TERM, 1940.

191.	The United States, Appellant,	} On Appeal from the Court of Claims.
vs.		
Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased.		
192	Kate B. Goltra and E. Field Goltra Jr., Executors of the Estate of Edward F. Goltra, Deceased, Appellants,	} On Cross Appeal from the Court of Claims.
vs.		
The United States.		

[February 3, 1941.]

Mr. Justice REED delivered the opinion of the Court.

The appeal brings here the correctness of the ruling by the Court of Claims which allows interest on a claim against the appellant, the United States. The cross appeal raises an issue that the compensation awarded is inadequate because the court failed to consider certain evidence as to the value for lease or use of the property involved.¹ The judgment was entered upon a petition filed under authority of a private jurisdictional act, quoted in the margin.²

This controversy had its inception on March 25, 1923. At that time Edward F. Goltra was the lessee of four tug boats and 19 steel

¹ Both parties also sought review by petition for certiorari because of this Court's decision in *Colgate v. United States*, 280 U. S. 43, and *Assiniboine Indian Tribe v. United States*, 292 U. S. 606. The inclusion of the phrase "as of right" in the jurisdictional act sufficiently makes clear the intention of Congress to authorize either party to take a technical appeal to this Court. Cf. House Report No. 828, 73rd Cong., 2nd Sess., p. 3.

² Act of April 18, 1934, 48 Stat. 1322, c. 150:

"Be it enacted . . . that jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of

barges belonging to the United States. While tied up for the winter on the Mississippi at the Port of St. Louis, they were repossessed because of an alleged breach of the lease, by Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, under orders from the Acting Secretary of War. Apparently some unloading facilities were also seized. In several court proceedings to recover possession Mr. Goltra was defeated.³ It would be futile to examine as to whether these adjudications determined all or any controversies between the parties, since the jurisdictional act opened the doors of the Court, "notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions." Suing under this special legislation Mr. Goltra⁴ sought damages for the wrongful taking of the fleet and facilities and recovered \$350,000 with six per cent interest from March 25, 1923, to the date of payment. The Government assigns error only to the allowance of interest and the executors only to the refusal to consider certain proffered evidence.

By a contract of 1919, with a supplement of 1921, Mr. Goltra leased the fleet of river boats for governmentally supervised operation as common carriers on the Mississippi and its tributaries from the Chief of Engineers as lessor. The lessor was acting for the War Department, the executive agency in charge of the boats. The term of the lease was five years from the delivery of the first unit of the fleet, which occurred on July 15, 1922. All net earnings were sequestered during the term for application upon the purchase of the fleet at cost or appraised value as detailed in the lease, with provision for subsequent installment payments over sixteen years. Section eight provided for termination by the lessor upon the lessee's noncompliance "in his judgment with any of the terms and conditions

of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of the Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

³ *Secretary of War v. Goltra*, 7 F. (2d) 838; *Ex parte United States*, 271 U. S. 389; *Goltra v. Secretary of War*, 271 U. S. 535; *Goltra v. Secretary of War*, 29 F. (2d) 257, cert. denied, 279 U. S. 843; *Goltra v. Inland Waterways Corp.*, 49 F. (2d) 497.

⁴ On his death his executors were substituted.

tions" and for the return to the lessor of the plant, barges and towboats.

On March 4, 1921, the Secretary of War consented, in accordance with the lease, that Mr. Goltra's tariffs should be 80 per cent of the prevailing rail tariffs. This consent was withdrawn in May, 1922, before the delivery of the boats, and a consent limited to specific articles substituted. A control over the amount of grain to be carried was delegated to the Federal Manager of the Mississippi-Warrior River Service, a government corporation which operated a competing line. The enterprise got under way in the summer of 1922 and was immediately entangled in the ordinary vicissitudes of river transportation. The towboats had mechanical deficiencies; the open barges were not suitable for grain or other perishables; low water seriously interfered with navigation. After a few months towing by one tug, the fleet went into winter quarters late in the fall. Before business was resumed, Mr. Goltra was notified on March 4, 1923, by the Secretary of War that the lease was terminated and he was directed to turn over the towboats, barges and unloading facilities to Colonel Ashburn. Obedience to this order was refused, and on March 25, 1923, Colonel Ashburn, under orders from the Acting Secretary of War, took possession of the fleet without the consent of Mr. Goltra or his employees, for the use and benefit of the United States.

The seizure was without the knowledge of the Chief of Engineers, who was the lessor empowered by its terms to terminate the lease, and that officer had not reached any conclusion to the effect that Mr. Goltra had in any manner failed in his obligations under the contract. Subsequently, in April, the Chief of Engineers terminated the lease pursuant to section eight. The action did not represent his judgment but was done under direction of his superior, the Secretary of War.

The Court of Claims fixed the damages as of the time of seizure, with interest to the date of payment "not as interest but as a part of just compensation."

Interest. By statute,⁵ derived from the Act of March 3, 1863, no interest is allowed on any claim up to the time of the rendition of judgment by the Court of Claims: This accords with the traditional immunity of the Government from the burden of in-

⁵ Judicial Code § 177.

terest unless it is specifically agreed upon by contract or imposed by legislation.⁶ Without controverting this general rule, the executors find authority for the allowance of interest in the provision of the jurisdictional act for "just compensation . . . for certain vessels and unloading apparatus taken, whether tortiously or not . . . , for the use and benefit of the United States." Their argument is that the words "just compensation" have within themselves the same legal significance of interest on the award or damages from the date of the taking as has been given to these same words in the Fifth Amendment. They further urge that this interpretation is required by the phrase in the act "for the use and benefit of the United States" and the accepted finding that Colonel Ashburn's taking was for that purpose. In support of this position, the ruling of this Court in *Seaboard Air Line Railway Company v. United States*⁷ and subsequent similar authority⁸ is relied upon.

In the *Seaboard* case, section 10 of the Lever Act authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of section 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property."⁹ This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized¹⁰ Acts of government officials in taking property without authorization of Congress confer no right

⁶ 1 Op. Atty. Gen. 268, 550, 554; 3 *id.* 635; 4 *id.* 14, 136, 286; 7 *id.* 525; 9 *id.* 449; *Tillson v. United States*, 100 U. S. 43, 47; *Angarica v. Bayard*, 127 U. S. 251, 260; *United States v. North Carolina*, 136 U. S. 211, 216; *National Volunteer Home v. Parrish*, 229 U. S. 494, 496.

⁷ 261 U. S. 299.

⁸ *Phelps v. United States*, 274 U. S. 341; *Jacobs v. United States*, 290 U. S. 13; *Liggett & Myers v. United States*, 274 U. S. 215; *Brooks Scanlon Corp. v. United States*, 265 U. S. 106, 123.

⁹ *Cf. Danforth v. United States*, 308 U. S. 271, 284-286.

¹⁰ See *United States v. North American Company*, 253 U. S. 330, 333-334, the *Seaboard* case at pages 304 and 305, the *Phelps* case at pages 343 and 344, and the *Jacobs* case at page 18.

of recovery upon the injured citizen.¹¹ There are two instances of Congressional ratification of takings which turned tortious acts into the exercise of the power of eminent domain and placed upon the Government the duty to make "just compensation," including sums in the nature of interest. These are *United States v. Creek Nation*¹² and *Shoshone Tribe v. United States*.¹³ In both cases there was a special jurisdictional act. In neither case was interest expressly allowed. In both this Court found Congressional confirmation of the previously unauthorized acts; in the *Creek* case, by disposition of the wrongfully acquired lands and failure to seek cancellation of the disposals after "full knowledge of the facts"¹⁴ and in the *Shoshone* case by "the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits."¹⁵

In the case now before us, however, there is neither the requisite Congressional authority before the taking nor any ratification or confirmation of the tort after the taking, which would justify a conclusion that the fleet was acquired by eminent domain. The jurisdictional act in itself is not an exercise of the power of eminent domain.¹⁶ As the lease required action by the Chief of Engineers, the attempt to cancel it by the letter of the Secretary of War of March 3, 1923, and the order of the Acting Secretary of March 22, 1923, to take possession was unauthorized. The lower court found the taking tortious.¹⁷ Nor can it be said that the continued possession and use by the United States indicated any confirmation or ratification of the tortious act, so as to bring this case within the rule of the *Creek* or *Shoshone* cases. A reading of the reports of the prior litigation¹⁸ makes abundantly clear

¹¹ *Hooe v. United States*, 218 U. S. 322, 333; *United States v. Buffalo Pitts Co.*, 234 U. S. 228, 235.

¹² 295 U. S. 103.

¹³ 299 U. S. 476.

¹⁴ 295 U. S. at 110.

¹⁵ 299 U. S. at 495.

¹⁶ *Shoshone Tribe v. United States*, 299 U. S. 476, 492.

¹⁷ *Hawkins v. United States*, 96 U. S. 689, 697; *Plumley v. United States*, 226 U. S. 545, 547; *Yuhasz v. United States*, 109 F. (2d) 467, 468; *Burton Coal Co. v. United States*, 60 Ct. Cls. 294, 312; *Lutz Co. v. United States*, 76 Ct. Cl. 405, 415.

¹⁸ See note 3 *supra*.

that the United States relied upon the termination of the lease by the Chief of Engineers which was practically contemporaneous with, though subsequent to, the taking, as their justification for possession of the fleet and property. This reliance found complete support in the various cited decisions of the courts, even though Mr. Goltra's petition for rehearing in this Court pointed out that the letter of the Chief of Engineers was written to justify the seizure.¹⁹ Notwithstanding these definite judicial decisions upon the rights of the parties, Congress felt that Mr. Goltra may not have had fair treatment. It passed the present jurisdictional act and to that the executors are relegated to find authority to allow interest.

Such acts are to be strictly construed.²⁰ In the preceding paragraphs we have demonstrated that this unauthorized taking and judicially approved retention was in no sense an exercise of the power of eminent domain. We see no ground to read into this act of grace, which was apparently drawn to rectify what Congress felt might be a wrong, an authority to allow interest as a part of just compensation. If interest was to be allowed for so long a period upon an ordinary claim, and contrary to established governmental practice, Congress would have so declared.²¹

Evidence. The main issue raised by the appeal of Mr. Goltra's executors relates to the evidence. In its opinion the Court of Claims said:

"It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi

¹⁹ Brief filed July 16, 1926, pp. 33-34: "The opinion violates the elementary common-law rule that a trespass cannot be justified by an act subsequent. It appears from the record that counsel for defendant caused this letter to be written for the sole purpose of justification of a prior trespass. It was not the act, therefore, of Major-General Beach for the purpose of canceling the contract, but the act of counsel for defendant to excuse the illegal act. We quote from the record: 'Mr. Hoeker: I caused this letter to be executed and delivered to Mr. Goltra for the purpose of meeting that objection. The Court: You caused a letter to be written a month after the seizure to justify the seizure and an attempted cancellation which had already been had? Mr. Hoeker: Yes, I did.' Certainly bad faith is shown here."

²⁰ *Dubuque & Pacific R. R. v. Litchfield*, 23 How. 66, 88; *Slidell v. Grand Jean*, 111 U. S. 412, 437-38; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 562; *Blair v. Chicago*, 201 U. S. 400, 471; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544; see *Russell v. Sebastian*, 233 U. S. 195, 205.

²¹ Cf. *Tillson v. United States*, 100 U. S. 43, 46; *Boston Sand Co. v. United States*, 278 U. S. 41, 46.

River should be taken into consideration. These contentions cannot be sustained."

Assuming that these items of evidence were competent, we cannot say that the Court of Claims, making a jury award, was bound to give them weight. The actual damages suffered by Mr. Goltra were highly speculative, especially since the contract was subject to lawful cancellation whenever the Chief of Engineers rightly or wrongly but in good faith determined that Mr. Goltra was violating its provisions. Mr. Goltra's operation under the lease had been a losing venture. Under these circumstances, the Court of Claims may have believed that an offer to purchase, made in May, 1925, was too remote to influence its judgment and that the rental value of other vessels on the Mississippi, not subject to the same restrictions as those taken by the Government, was too unreliable to afford a useful comparison. It was for the Court of Claims to decide what weight such facts deserved, and we construe its opinion only as holding that under the circumstances of this case the evidence was not considered to be of any assistance in reaching a conclusion.

Mr. Goltra's executors also complain of the failure of the Court of Claims to make certain findings, but there is no indication that the Court of Claims did not consider the facts which were embodied in the proposed findings.

The judgment in No. 191 is modified as indicated in the opinion and, as modified, affirmed; the judgment in No. 192 is affirmed.

The CHIEF Justice and Mr. Justice BLACK took no part in the consideration and decision of these appeals.

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Test:

Clerk, Supreme Court, U. S.

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